

## Pharmacy Benefits Manager – Agreement

**THIS AGREEMENT** is entered into as of the 1<sup>st</sup> day of July 2014 (the “Effective Date”) between Express Scripts, located at One Express Way, St. Louis, MO 63121 and City of Tempe (“CITY OF TEMPE”), located at 20 E 6<sup>th</sup> Street, Tempe, AZ 85281.

**WHEREAS**, CITY OF TEMPE provides for the payment of prescription drugs and related services for persons eligible to receive such benefits through affiliation with a group that has a contract or other arrangement in effect with CITY OF TEMPE; and

**WHEREAS**, Express Scripts, provides prescription drug benefits programs and, in connection therewith, has established networks of participating retail pharmacies and operates a system for the processing, fulfillment and payment of claims for prescription drugs furnished by such pharmacies; and

**WHEREAS**, Express Scripts By Mail – mail order pharmacy affiliates are licensed pharmacies which provide prescription drugs via a mail order service; and

**WHEREAS**, CITY OF TEMPE desires to retain the services of Express Scripts and its subsidiaries and affiliates, including Express Scripts Health, L.L.C., which holds TPA licenses in certain states, as applicable, to provide a prescription drug benefit program (the “Program”) including, but not limited to, retail pharmacy and mail order pharmacy and specialty drug pharmacy services for eligible persons, point-of-care, physician office communications and cost containment initiatives developed and implemented by Express Scripts, which may include communications with prescribers, patients and/or participating pharmacies, and financial incentives to participating pharmacies for their participation in such initiatives (collectively, “PBM Services”).

NOW, THEREFORE, in consideration of the premises and the mutual covenants contained herein, the parties hereto agree as follows:

### 1. Definitions

- A. **Ancillary Supplies, Equipment, and Services or ASES** means ancillary supplies, equipment, and services provided or coordinated by ESI Specialty Pharmacy in connection with ESI Specialty Pharmacy’s dispensing of Specialty Products. ASES may include all or some of the following: telephonic and/or in-person training, nursing/clinical services, in-home infusion and related support, patient monitoring, medication pumps, tubing, syringes, gauze pads, sharps containers, lancets, test strips, other supplies, and durable medical equipment. The aforementioned list is illustrative only (not exhaustive) and may include other supplies, equipment, and services based on the patient’s needs, prescriber instructions, payer requirements, and/or the Specialty Product manufacturer’s requirements.
- B. **Average Wholesale Price or AWP** means the average wholesale price of a prescription drug as identified by drug pricing services such as Medi-Span or other source recognized in the retail prescription drug industry selected by ESI (the “Pricing Source”). The applicable AWP shall be the 11-digit NDC for the product on the date dispensed, and for prescriptions filled in (a) Participating Pharmacies and ESI Specialty Pharmacy will be

the AWP for the package size from which the prescription drug was dispensed, and (b) in the Mail Service Pharmacy the AWP for the smaller of: (i) the NDC code for the package size from which the prescription drug was dispensed, or (ii) package sizes of 100 units or 16 ounce quantities, or the next larger quantity if such specified quantities are not available. If the Pricing Source discontinues the reporting of AWP or materially changes the manner in which AWP is calculated, then ESI reserves the right to make an equitable adjustment as necessary to maintain the parties' relative economics and the pricing intent of this Agreement.

- C. **Brand/Generic Algorithm or BGA** means ESI's standard and proprietary brand/generic algorithm, a copy of which may be made available for review by Sponsor or its Auditor upon request. The purposes of the algorithm are to utilize a comprehensive and logical algorithm to determine the brand or generic status of products in the ESI master drug file using a combination of industry standard attributes, to stabilize products "flipping" between brand and generic status as may be the case when a single indicator is used from industry pricing sources, and to reduce Sponsor, Member and provider confusion due to fluctuations in brand/generic status. Sponsor or its Auditor may audit ESI's application of its BGA to confirm that ESI is making brand and generic drug determinations consistent with such algorithm.
- D. **Brand Drug** means a prescription drug identified as such in ESI's master drug file using indicators from First Databank (or other source nationally recognized in the prescription drug industry) on the basis of a standard Brand/Generic Algorithm, a copy of which may be made available for review by Sponsor or its Auditor upon request. Notwithstanding the foregoing, certain prescription drug medications that are licensed and then currently marketed as brand name drugs, where there exists at least one (1) competing prescription medication that is a generic equivalent and interchangeable with the marketed brand name drug, may process as "Generic Drugs" for Prescription Drug Claim adjudication and Member Copayment purposes.
- E. **Business Days or business days** means all days except Saturdays, Sundays, and federal holidays. All references to "day(s)" are to calendar days unless "business day" is specified.
- F. **Compound Prescription** means a prescription that meets the following criteria: two or more solid, semi-solid or liquid ingredients, at least one of which is a Covered Drug, that are weighed or measured then prepared according to the prescriber's order and the pharmacist's art.
- G. **Contract Quarter** means the full three (3) month period commencing on the Effective Date, and each full consecutive three (3) month period thereafter that this Agreement remains in effect.
- H. **Contract Year** means the full twelve (12) month period commencing on the Effective Date, and each full consecutive twelve (12) month period thereafter that this Agreement

remains in effect.

- I. **Copayment and/or Coinsurance** means the amount to be paid by an Eligible Person for each prescription or authorized refill as determined in accordance with the Plan Design(s).
- J. **Covered Drugs** means drugs which, under state or federal law, require a prescription, including Compound prescriptions. Excluded from Covered Drugs are (i) cosmetic drugs, (ii) appliances, devices, bandages, heat lamps, braces, splints, and artificial appliances, (iii) health and beauty aids, cosmetics and dietary supplements and (iv) OTC products (“Exclusions”). Additional Covered Drugs and/or Exclusions applicable to any individual Group will be designated by CITY OF TEMPE in the applicable Plan Design.
- K. **Dispensing Fee** means the amount payable by City of Tempe pursuant to Sections 1, 2 and 3 of Schedule A this Agreement for a Participating Pharmacy or Express Scripts to dispense a prescription or authorized refill to an Eligible Person.
- L. **Eligible Person** means each person who, through affiliation with a Group, is eligible for prescription drug benefits pursuant to this Agreement, and such person’s qualified dependents.
- M. **Generic Drug** means a prescription drug, whether identified by its chemical, proprietary, or non-proprietary name, that is therapeutically equivalent and interchangeable with drugs having an identical amount of the same active ingredient(s) and approved by the FDA, and which is identified as such in ESI’s master drug file using indicators from First Databank (or other source nationally recognized in the prescription drug industry) on the basis of a standard Brand/Generic Algorithm, a copy of which may be made available for review by Sponsor or its Auditor upon request.
- N. **Group** means a group of Eligible Persons that have the same Plan Design as designated by the City of Tempe.
- O. **Integrated Program** means a program in which Eligible Persons enrolled in such program may have prescriptions dispensed either (i) by a Participating Pharmacy under the Retail Pharmacy Program or (ii) by Express Scripts under the Mail Order Pharmacy Program. Reference to the Retail Pharmacy Program and/or Mail Order Pharmacy Program herein will include services performed by Express Scripts for Eligible Persons enrolled in the Integrated Program.
- P. **MAC or the Maximum Allowable Cost** consists of a list of off-patent drugs subject to maximum allowable cost payment schedules developed or selected by Express Scripts. The payment schedules specify the maximum unit ingredient cost payable by the City of Tempe for drugs on the MAC list. The MAC list and payment schedules are frequently updated.
- Q. **Mail Order Pharmacy Program** means the program described in Section 20 through which Eligible Persons may submit a prescription along with the applicable Copayment/Coinsurance to Express Scripts for dispensing via mail order.
- R. **Manufacturer Administrative Fees** means those administrative fees paid by manufacturers to ESI pursuant to a contract between ESI and the manufacturer in connection with ESI’s administering, invoicing, allocating and collecting the Rebates

under the Rebate program.

- S. **Minimum Enrollment** means an enrollment of not less than 3,500 Eligible Persons under the Program.
- T. **Participating Pharmacy** means a retail pharmacy that has entered into an arrangement with Express Scripts that specifies the terms and conditions of the pharmacy's participation, including the rates that Express Scripts will pay the pharmacy to participate in Express Scripts's retail network(s) servicing the City of Tempe's Program including the rates that Express Scripts will pay the pharmacy. Participating Pharmacies are independent contractors of ESI.
- U. **Plan Design** means Program drug coverage, days supply limitation, Copayment/Coinsurance, Formulary (including Formulary drug selection and relative cost indication) and other Program specifications applicable to the Program designated by the City of Tempe as set forth in this Agreement or otherwise documented between the parties.
- V. **Primary Eligible Participant** means each Eligible Person, excluding Eligible Persons who are qualified dependents.
- W. **Program Pricing Terms** means the (i) financial or pricing terms, allowances and guarantees set forth in Schedule a of this Agreement and (ii) the performance standards and liquidated damages set forth in Section 21 of this Agreement
- X. **Rebates** mean retrospective formulary rebates that are paid to ESI pursuant to the terms of a formulary rebate contract negotiated independently by ESI with a pharmaceutical manufacturer and directly attributable to the utilization of certain Covered Drugs by Members. Rebates do not include Manufacturer Administrative Fees; product discounts or fees related to the procurement of prescription drug inventories by ESI Specialty Pharmacy or the Mail Service Pharmacy; fees received by ESI from pharmaceutical manufacturers for care management or other services provided in connection with the dispensing of products; or other fee-for-service arrangements whereby pharmaceutical manufacturers generally report the fees paid to ESI or its affiliates for services rendered as "bona fide service fees" pursuant to federal laws and regulations (collectively, "Other Pharma Revenue"). Such laws and regulations, as well as ESI's contracts with pharmaceutical manufacturers, generally prohibit ESI from sharing any such "bona fide service fees" earned by ESI, whether wholly or in part, with any ESI client. ESI represents and warrants that it will not enter into any agreement with a pharmaceutical manufacturer for Other Pharma Revenue with the intent to reduce Rebates.
- Y. **Retail Pharmacy Program** means the program described in Section 19 in which Eligible Persons may purchase Covered Drugs from a Participating Pharmacy upon verification of Program eligibility and payment of the applicable Copayment/Coinsurance, and the claim is submitted by the Participating Pharmacy to Express Scripts for payment in accordance with this Agreement and the applicable Express Scripts Participating Pharmacy agreement.
- Z. **Specialty Drugs** means pharmaceutical products that are generally biotechnological in nature, with many requiring injection or non-oral methods of administration, and that may have special shipping or handling requirements. Some of the disease categories currently

in Express Scripts's specialty pharmacy programs include cancer, multiple sclerosis, Hepatitis C, rheumatoid arthritis, cystic fibrosis, infertility, RSV prophylaxis, Gaucher disease, growth hormone deficiency, hemophilia and immune deficiency.

- AA. **TelePAID® System or TelePAID®** means Express Scripts's real time, on-line system for adjudicating prescription drug claims submitted by retail pharmacies.

## **2. City of Tempe Furnished Information**

CITY OF TEMPE will promptly furnish, in a format acceptable to Express Scripts, all information necessary for Express Scripts to render the services set forth herein. Such information will include, but is not limited to:

- A. A file of Eligible Persons, and subsequent timely additions and deletions to such file as changes occur. CITY OF TEMPE will pay for any Covered Drug dispensed to a person reported by CITY OF TEMPE as no longer an Eligible Person, if such notification is not received by Express Scripts at least two (2) full business days prior to the dispensing date of such prescription.
- B. Designation, in writing, of those Plan Design features to be determined by CITY OF TEMPE.
- C. The reimbursement terms applicable to direct reimbursement claims submitted by Eligible Persons under the Retail Pharmacy Program.
- D. The type, number, and description of Express Scripts identification cards ("Identification Cards") required under the Retail Pharmacy Program.

## **3. Standard Terms and Conditions**

**3.1 Certification:** By signing the "Vendor's Proposal Offer", form 201-B, Express Scripts certified:

- A. The submission of the proposal offer response did not involve collusion or other anti-competitive practices.
- B. Express Scripts shall not discriminate against any employee or applicant for employment in violation of Federal and Arizona State law and the Express Scripts shall comply with the Americans with Disabilities Act (ADA). Suppliers of products and services to the City of Tempe shall operate as an equal opportunity employer and shall not discriminate against any employee or applicant for employment because of race, color, religion, age, sex, sexual orientation, national origin, or because he or she has a physical or mental disability or because he or she is a disabled veteran or a veteran of the Vietnam era, including, without limitation, with respect to employment, upgrading, demotion or transfer, recruitment or recruitment advertising, layoff or termination, rates of pay or other forms of compensation, and selection for training including apprenticeship.

The City Procurement Office is committed to fair and equal procurement opportunities for all firms wishing to do business with the City and encourages the participation of small and disadvantaged businesses in all proposals and contracting activities conducted by the City.

- C. Express Scripts has not given, offered to give, nor intends to give at any time hereafter any economic opportunity, future employment, gift, loan, gratuity, special discount, trip, favor, or service to a public servant in connection with the submitted offer. Failure to sign the “Vendor’s Proposal Offer” or signing it with a false statement shall void the submitted proposal offer and/or any resulting contract. In addition, the vendor may be debarred from future proposal and bidding participation with the City and may be subject to such actions as permitted by law.

**3.2 Gratuities:** The City may, by written notice to Express Scripts, cancel any resultant contract, if it is found that gratuities in any form were offered or given by Express Scripts or agent or representative of the Express Scripts, to any employee of the City or member of a City evaluation committee with a view toward securing an order, securing favorable treatment with respect to awarding, amending or making of any determinations with respect to performing such order. In event the contract is canceled by the City pursuant to this provision, the City shall be entitled, in addition to any other rights and remedies, to recover or withhold from contractor the amount of gratuity.

**3.3 Applicable Law:** This contract shall be governed in accordance with the laws of the State of Arizona and suits pertaining to this Agreement may only be brought in courts located in Maricopa County, Arizona.

However, all matters relating to the Mail Order Pharmacy Program operation of Express Scripts will be governed by the laws of the state in which Express Scripts’ mail order pharmacy is located.

**3.4 Dispute Resolution:** Except for those matters subject to emergent or injunctive relief, this contract is subject to arbitration to the extent required by law. If arbitration is not required by law, the City and Express Scripts will meet and/or consult with each other in good faith to resolve any disputes arising out of the contract. If good faith efforts fail, then the City and Express Scripts may attempt to resolve any disputes through mediation. If mediation is utilized, the City and Express Scripts mutually will agree upon a mediator whose fees will be shared equally by the City and Express Scripts.

**3.5 Contract Modifications:** This contract may only be modified in writing by the parties.

**3.6 Severability:** The provisions of this contract are severable to the extent that any provision or application held to be invalid shall not affect any other provision or application of the contract, which may remain in effect without the invalid provision or application to the extent that the material provisions of this RFP and contract are not materially vitiated.

**3.7 Relationship of Parties:** It is clearly understood that each party to this contract will act in its individual capacity and not as an agent, employee, partner, joint venturer, or associate of the other party. An employee or agent of one party shall not be an employee or agent of the other party for any purpose whatsoever.

**3.8 Contract Assignment:** No right or interest in this contract shall be assigned by either party provided, however, that services to be performed by Express Scripts hereunder may be performed by its subsidiaries, affiliates, divisions and/or designees. The duties and

obligations of the parties will be binding upon, and inure to the benefit of, successors, assigns, or merged or consolidated entities of the parties.

**3.9 Rights and Remedies:** The waiver of any breach or violation of any term or provision hereof will not constitute a waiver of any subsequent breach or violation of the same or any other term or provision. No waiver or relinquishment by a party of any right or remedy under this Agreement will occur unless the waiver or relinquishment is in a written document signed by an officer of the party.

**3.10 Financial Responsibility** - If Express Scripts has reasonable grounds to believe that CITY OF TEMPE may not meet its payment obligations under this Agreement as they become due, Express Scripts may request information and/or reasonable assurances (including a deposit) from CITY OF TEMPE as to its financial responsibility. If the information or assurances are not furnished to Express Scripts within five (5) days, or are not satisfactory in Express Scripts's reasonable judgment, Express Scripts may immediately terminate this Agreement or suspend performance pending receipt of the requested information or assurances.

**3.11 Plan Design** - The Program Pricing Terms set forth in this Agreement are based upon the Plan Designs, Minimum Enrollment and Program specifications agreed to between the parties as reflected in this Agreement and as otherwise hereafter agreed to by the parties in writing. The Program Pricing Terms are also based upon CITY OF TEMPE funding 50% or greater of the costs of Covered Drugs for its Eligible Persons. Any modification of the Plan Design or Program specifications, failure to maintain Minimum Enrollment, or inclusion of Eligible Persons or Groups with Covered Drugs funded less than 50% by CITY OF TEMPE, may result in a retroactive modification by Express Scripts of the Program Pricing Terms. CITY OF TEMPE will provide Eligible Persons with at least thirty (30) days' prior notice of approved Plan Design changes. If the number of CITY OF TEMPE's Eligible Persons eligible for Medicare is materially reduced or eliminated for any reason, Express Scripts may communicate with those persons at Express Scripts's expense regarding Part D options, including Express Scripts Part D services, and the Program Pricing Terms may be modified to reflect the reduction or elimination.

**3.12 ERISA Claims and Appeals**

UM Company. In the event ESI performs appeals services, or facilitates the performance of appeals services through the UM Company, ESI or the UM Company, as applicable, will be responsible for conducting the appeal on behalf of Sponsor in accordance with the Claims Rules. ESI represents to Sponsor that UM Company has contractually agreed that: (A) UM Company will conduct appeals in accordance with the Claims Rules and Sponsor's plan, (B) Sponsor is a third party beneficiary of UM Company's agreement with ESI (a copy of which is available upon request) and the remedies set forth therein, and (C) UM Company will indemnify Sponsor for third party claims caused by the UM Company's negligence or willful misconduct in providing the appeal services. "UM Company" means MCMC, LLC or other independent third party utilization management company contracted by ESI, subject to the provisions of this Section 3.12.

**(e) External Review Services.**

ESI will not conduct any external review services (as defined in the Patient Protection

and Affordable Care Act of 2010 and its implementing regulations (“PPACA”)); provided, however, Sponsor may elect to have UM Company facilitate the provision of external review services through UM company contracted IROs (as such term is defined in PPACA), for the fees set forth on Schedule A below (if applicable). Sponsor must execute a standard ESI “External Appeals Services” Set-Up Form, which may be requested through ESI Account Management, in order to receive such services from UM Company.

In the event that Sponsor elects to utilize UM Company to facilitate the provision of external review services through UM Company contracted IROs, UM Company will be responsible for facilitating all such appeals (and the IROs will be responsible for providing all such appeals) in accordance with PPACA and all other applicable federal and state laws, and Sponsor hereby acknowledges and agrees that:

- (i) UM Company (with respect to facilitating the external reviews) and the IROs (with respect to performing the external reviews), and not ESI, will be providing external review services; UM Company is an independent contractor of ESI; the IROs are independent contractors of UM Company and not ESI; and ESI does not in any way control or direct either UM Company or the IROs with respect to facilitation or performance of external review services provided by each respectively.
- (ii) ESI represents to Sponsor that UM Company has contractually agreed that: (A) UM Company will facilitate all external review services in accordance with PPACA and all other applicable federal and state laws; (B) UM Company will contractually require its contracted IROs to perform all external reviews in accordance with PPACA and all other applicable federal and state laws; (C) to the extent not prohibited by law, UM Company will indemnify, defend and hold Sponsor harmless from and against any and all losses, damages, injuries, causes of action, claims, demands and expenses (including reasonable attorney’s fees, costs and expenses), arising out of, resulting from, or related to any act, omission or default by the IROs in their performance of the external reviews; and (D) Sponsor has third party beneficiary rights to enforce the preceding indemnification and hold harmless provision.

**3.13 Compliance with Law** – Express Scripts and CITY OF TEMPE shall take all actions necessary and appropriate to assure that they comply with all applicable federal, state, and local laws and regulations, including, without limitation, the Anti-Kickback Statute, the Public Contracts Anti-Kickback Act, the Stark Law, and laws and regulations relating to disclosure or notification of plan benefits or the terms of rebate administration under this Agreement to CITY OF TEMPE’s Groups. Express Scripts’s Code of Conduct and its policies and procedures relating to compliance with the above-named laws are available at [www.Express Scripts.com](http://www.Express Scripts.com).

**4. Overcharges By Antitrust Violations:** The City maintains that, in actual practice, overcharges resulting from antitrust violations are borne by the City. Therefore, to the extent permitted by law, Express Scripts hereby assigns to the City any and all claims for such overcharges as the goods and/or services used fulfill the contract.

**5. Force Majeure:** Except for payment of sums due, neither party shall be liable to the other nor deemed in default under the contract if and to the extent that such party’s



performance of the contract is prevented by reason of force majeure. Force majeure means an occurrence that is beyond the control of the party affected and occurs without its fault or negligence. Without limiting the foregoing, force majeure includes acts of God, acts of the public enemy, war, riots, mobilization, labor disputes, civil disorders, fire, floods, lockouts, injunctions, failures or refusal to act by government authority, and other similar occurrences beyond the control of the party declaring force majeure which such party is unable to prevent by exercising reasonable diligence.

Force majeure shall not include the following occurrences:

- Late delivery of equipment or materials caused by congestion at a manufacturer's plant or elsewhere, an oversold condition of the market, inefficiencies, or similar occurrences.
- Late performance by a subcontractor unless the delay arises from a force majeure occurrence in accordance with this force majeure clause.
- Any delay or failure in performance by either party shall not constitute default hereunder or give rise to any claim for damages or loss of anticipated profits if, and to the extent that such delay or failure is caused by force majeure.

If either party is delayed at any time in the progress of the work by force majeure, then the delayed party shall notify the other party in writing of such delay within forty-eight (48) hours of the commencement thereof and shall specify the causes of such delay in the notice. Such notice shall be hand delivered or sent via Certified Mail - Return Receipt Requested and shall make a specific reference to this clause, thereby invoking its provisions. The delayed party shall cause such delay to cease as soon as practicable and shall notify the other party in writing by hand delivery or Certified Mail - Return Receipt Requested when it has done so. The time of completion shall be extended by contract modification for a period of time equal to the time that the results or effects of such delay prevent the delayed party from performing in accordance with the contract.

6. **Conflict of Interest:** This contract is subject to the cancellation provisions of A.R.S. Section 38.511.
7. **Exclusivity:** Express Scripts will be the exclusive provider and administrator of PBM Services to CITY OF TEMPE and its subsidiaries while this Agreement is in effect. Nothing contained herein, however, will prohibit Express Scripts or any affiliated entity from providing or administering PBM Services and related programs and services to any other entity while this Agreement is in effect
8. **Licenses:** Express Scripts shall maintain in current status all applicable Federal, State and Local licenses and permits required for the operation of the business conducted by the Contractor.
9. **Insurance:** Prior to commencing any work or services under this contract, Express Scripts shall procure and maintain for the duration of the contract insurance against claims for injuries to persons and damages to property, which may arise from or in connection with the performance of the work hereunder by the contractor, his agents, representatives, employees, or subcontractors.

A Contract Award Notice or Purchase Order will not be issued to Express Scripts until receipt of all required insurance documents by the City Procurement Office and such documents must meet all requirements of this Insurance clause. In addition, before any contract is renewed for additional time periods, all required insurance must be in force and on file with the City Procurement Office. Express Scripts must submit required insurance within 10 calendar days after request by the City Procurement Office or the award may be rescinded and another vendor selected for award.

#### Minimum Limits Of Insurance

Contractor shall maintain limits no less than:

1. Commercial General Liability: \$5,000,000 combined single limit per occurrence for bodily injury and property damage, including coverage for contractual liability, personal injury, broad form property damage, products, completed operations, and product liability. The general aggregate limit shall apply separately to this project/location or the general aggregate shall be twice the required occurrence limit.
2. Automobile Liability: \$1,000,000 combined single limit per accident for bodily injury and property damage, including coverage for owned, hired, and non-owned vehicles as applicable.
3. Workers' Compensation and Employers Liability: Workers' Compensation and Employers Liability statutory limits as required by the State of Arizona.
4. Professional Liability: The Consultant retained by the City, to provide the consulting services required by the Contract will maintain Professional Liability insurance covering errors and omissions arising out of the services performed by the Consultant or any person employed by him with a limit of not less than \$5,000,000 all claims. In the event the insurance policy is written on a "Claims made" basis, coverage shall extend for two years past completion and acceptance of Services as evidenced by annual Certificates of Insurance.
5. Other Insurance: (If applicable, see supplement.)

#### Other Insurance Provisions

The policies are to contain, or be endorsed to contain, the following provisions:

1. Commercial General Liability and Automobile Liability Coverage:

- A. The Contractor's insurance coverage shall be primary as respects the City for claims arising out of the services provided by Contractor under this Agreement, its officials, employees, and volunteers. Any insurance or self-insurance maintained by the City, its officials, employees, or volunteers shall be excess of the contractor's insurance and shall not contribute to it. The amount and type of insurance coverage required by this contract shall not limit the scope of the indemnity provided by this contract.

2. All Coverages

- A. Coverage shall not be suspended, voided, and/or canceled by either party, reduced in coverage or in limits except after thirty (30) days prior written notice has been given to the City.

**Other Insurance Requirements:**

Express Scripts shall:

1. Prior to commencement of services, furnish the City with certificates of insurance, which shall clearly evidence all insurance required in this contract, and in accord with stated insurance requirements of this Request For Proposal. City shall not be obligated, however, to review same or to advise contractor of any deficiencies in such policies and endorsements, and such receipt shall not relieve contractor from, or be deemed waiver of City's right to insist on, strict fulfillment of contractor's obligations under this contract.
2. Replace certificates, policies, and endorsements for any such insurance expiring prior to completion of services.
3. Maintain such insurance from the time services commence until services are completed. If insurance is not reinstated, City may at its sole option, terminate this contract effective on the date of such lapse of insurance.
4. Place such insurance with insurers and agents licensed and authorized to do business in Arizona and having a Best's rating of no less than A-VII.
5. Maintain such coverage continuously throughout the term of this contract and without lapse for a period of two years beyond the contract expiration, should any of the required insurance be provided under a claims-made form, to the extent that should occurrences during the contract term give rise to the claims made after expiration of the contract, such claims shall be covered by such claims-made policies. Such extension of coverage shall be evidenced by annual certificates of insurance.

**10. Subcontractors and Sub-Subcontractors**

All coverage for subcontractors and sub-subcontractors shall be subject to all of the requirements stated herein for the contractor.

- 11. Notices:** All notices required hereunder (for the purposes of this provision collectively called "Notices"), shall be in writing and shall be hand delivered or sent by overnight delivery by a nationally recognized service or sent by registered or certified United States mail, return receipt requested, postage prepaid, addressed to the party or parties to receive such notice as follows:

If intended for the City, to:

CITY PROCUREMENT OFFICE CITY OF TEMPE  
20 E. 6<sup>th</sup> Street (Second Floor)  
PO Box 5002  
Tempe, Arizona 85280

If intended for the Express Scripts, to:

Express Scripts, to:  
Attn: President  
One Express Way  
St. Louis, Missouri 63121  
With copy to Legal Department  
Fax No. (800) 417-8163

or to such other address as either party may from time to time furnish in writing to the other by notice hereunder.

12. **Key Personnel:** It is essential that the Express Scripts provide adequate experienced personnel, capable of and devoted to the successful accomplishment of work to be performed under this contract. Express Scripts must agree to assign specific individuals to the key positions.

- A. Express Scripts agrees that, once assigned to work under this contract, key personnel shall not be removed or replaced without written notice to the City.
- B. If key personnel are not available for work under this contract for a continuous period exceeding 30 calendar days, or are expected to devote substantially less effort to the work than initially anticipated, the contractor shall immediately notify the City, and shall, subject to the concurrence of the City, replace each person with personnel of substantially equal ability and qualifications.

13. **Payments:**

Express Scripts will provide the City of Tempe with a bi-weekly consolidated invoice for services provided by Express Scripts under the Program, in accordance with the Program Pricing set forth in Schedule A. All invoices will be paid in full by CITY OF TEMPE within fifteen (15) calendar days of receipt by wire transfer, electronic debit, or other method approved by Express Scripts in writing.

The City of Tempe will pay Express Scripts for administrative products and services provided by Express Scripts under the Program in accordance with the Administrative Fee provisions set forth in Schedule A. Express Scripts will provide the City of Tempe with an Administrative Fee invoice in accordance with Express Scripts's four (4) week Administrative Fee cycle. The City of Tempe will pay Administrative Fee invoices in full within fifteen (15) days of the invoice date.

Subject to whether payments due to Participating Pharmacies for Covered Drugs under this Agreement become subject to prompt payment related legislation or regulation, CITY OF TEMPE may be required to pay a deposit in an amount to be reasonably determined by Express Scripts, which amount may be periodically modified by Express Scripts based on CITY OF TEMPE's actual claims experience and enrollment. This deposit may be used by Express Scripts to offset the failure by CITY OF TEMPE, for any reason, to make any payments pursuant to the terms of this Agreement and/or to make payments due in accordance with prompt payment legislation or regulation prior to

Express Scripts's billing and receipt of CITY OF TEMPE's payment due under Section 0, and does not, in any way, limit other remedies available to Express Scripts. The deposit, to the extent not utilized to offset any payment default by CITY OF TEMPE under this Agreement, will be returned, without interest, to CITY OF TEMPE within the greater of one hundred eighty (180) days following termination of this Agreement or following any agreed upon date for extended services.

Failure by CITY OF TEMPE to make any payments in accordance with the terms of this Agreement will constitute a payment default. Notwithstanding Section 16.2 of this Agreement, if CITY OF TEMPE fails to cure any such payment default within two (2) days, in addition to other available remedies, Express Scripts may cease performing any or all of its obligations under, or may terminate this Agreement upon notice to CITY OF TEMPE. After the two (2) day grace period, there will be a late payment fee of 1% per month on the balance due, accruing as of the due date. CITY OF TEMPE will reimburse Express Scripts for all collection costs incurred by Express Scripts as a result of any payment default by CITY OF TEMPE under this Agreement.

#### **14. Records**

- 14.1 Express Scripts will maintain all claims records relating to services performed under this Agreement as required by applicable law. Such claims records will be in their original form, on microfilm, microfiche or other form determined by Express Scripts. CITY OF TEMPE claims records may be audited by CITY OF TEMPE or its representative reasonably acceptable to Express Scripts, subject to execution of a confidentiality agreement, for a maximum period of twenty-four (24) months prior to the agreed upon audit date at no cost. CITY OF TEMPE may conduct an audit once annually from January through September on an agreed upon date. Subject to Section 14.3, Express Scripts may retain copies of such claims records for its own use.
- 14.2 Any audit of Express Scripts's agreements with pharmaceutical manufacturers may be conducted by a top 100 public accounting firm approved by Express Scripts whose audit department is a separate stand alone function of its business and that carries insurance for professional malpractice of at least \$2,000,000. The audit will include only those portions of the pharmaceutical manufacturer agreements as necessary to determine Express Scripts's compliance with Section 22 above in respect to Total Rebates. The audit may be conducted once annually from January through September, at Express Scripts's offices as scheduled by agreement of the parties, but not sooner than ninety (90) days after execution of a confidentiality agreement.
- 14.3 Any auditor performing an audit under this Section 14 will warrant and represent that it is not providing Litigation Services to any person or entity in connection with any lawsuit, investigation, or other proceeding that is pending or contemplated against Express Scripts. "Litigation Services" include (a) examining pharmacy claims or any other documents or information, or (b) providing advice, analysis, and/or opinions as a disclosed or undisclosed expert or consultant. The auditor must agree that, for a period of one (1) year after completion of the audit, it will not provide Litigation Services in any lawsuit, investigation, or other proceeding brought against Express Scripts, except for Litigation Services to CITY OF TEMPE in any proceeding against Express Scripts.
- 14.4 Upon request, CITY OF TEMPE will furnish its most recent audited financial statement to Express Scripts.

## **15. Confidential Information**

- 15.1 The Confidential Information of a party (the “disclosing party”) which is disclosed to the other party (the “receiving party”) will be held by the receiving party in strictest confidence at all times and will not be used by the receiving party (or its affiliates, employees, officers, directors or limited liability company managers (“Representatives”)) for any purpose not previously authorized by the disclosing party, except as necessary for Express Scripts to perform the services under this Agreement. The Confidential Information of the disclosing party will not be disclosed or divulged by the receiving party to anyone, except with the prior written permission of the disclosing party and on the condition that the party to whom the Confidential Information is disclosed agrees in writing in advance to be bound by these terms and conditions. The receiving party may disclose the Confidential Information to those of its Representatives who need to review the Confidential Information for the purposes authorized by the disclosing party but only after the receiving party has informed them of the confidential nature of the Confidential Information and directs them to treat the Confidential Information in accordance with the terms of this Agreement. The disclosing party retains all right, title and interest in and to its Confidential Information.

The term “Confidential Information “ includes, but is not limited to, any information of either the receiving or disclosing party (whether oral, written, visual or fixed in any tangible medium of expression), relating to either party’s services, operations, systems, programs, inventions, techniques, suppliers, customers and prospective customers, contractors, cost and pricing data, trade secrets, know-how, processes, plans, reports, designs and any other information of or relating to either party’s business, including its therapeutic and disease management programs, but does not include information which (a) was known to the receiving party before it was disclosed to the receiving party by the disclosing party, (b) was or becomes available to the receiving party from a source other than the disclosing party, provided such fact is evidenced in writing and the source is not bound by a confidentiality obligation to the disclosing party, or (c) is developed by the receiving party independently of the disclosing party’s Confidential Information, provided that such fact can be documented. Each party will also keep the terms of this Agreement confidential as Confidential Information, except as required by law or regulation.

- 15.2 If the receiving party is requested or required (by oral questions, interrogatories, requests for information or documents, subpoena, civil investigative demand, any informal or formal investigation by any government or governmental agency or authority, law or regulation, or otherwise) to disclose any of the Confidential Information, the receiving party will notify the disclosing party promptly in writing so that the disclosing party may seek a protective order or other appropriate remedy or, in its sole discretion, waive compliance with the terms of this Agreement. The receiving party agrees not to oppose any action by the disclosing party to obtain a protective order or other appropriate remedy. If no such protective order or other remedy is obtained, or the disclosing party waives compliance with the terms of this Agreement, the receiving party will furnish only that portion of the Confidential Information which it is advised by counsel is legally required and will exercise its reasonable best efforts to obtain reliable assurance that confidential treatment will be accorded the Confidential Information.

- 15.3 CITY OF TEMPE and Express Scripts may not utilize the service marks, trademarks, or tradenames of any other party to this Agreement, or any service marks, trademarks, or tradenames so similar as likely to cause confusion, without express written approval of such other party. The programs implemented by Express Scripts will remain the sole property of Express Scripts and will only be used by CITY OF TEMPE in connection with the Program and so long as Express Scripts administers the Program.

Express Scripts and CITY OF TEMPE will comply with all applicable laws and regulations regarding patient confidentiality as provided in the Business Associate Agreement between the parties. Express Scripts will not furnish any CITY OF TEMPE identifiable data or information to any third party without the written consent of CITY OF TEMPE, except as reasonably necessary to implement and operate the Program and fulfill its obligations pursuant to this Agreement or as required by applicable law. The restrictions set forth in this Section 15 will not apply to claims data or information which is not identifiable on a CITY OF TEMPE basis.

**16. Indemnification/Limitation of Liability**

- a. Express Scripts will indemnify and hold CITY OF TEMPE, its subsidiaries, affiliates, and their officers, directors and employees (each a “CITY OF TEMPE Indemnified Party”) harmless from and against claims, suits, actions, or causes of action (“Actions”) asserted against a CITY OF TEMPE Indemnified Party arising from services rendered by Express Scripts pursuant to this Agreement to the extent the Action arises from Express Scripts’s negligence or willful misconduct, or breach of this Agreement, provided that (a) CITY OF TEMPE has given reasonable notice to Express Scripts of the Action, and (b) no CITY OF TEMPE Indemnified Party has, by act or failure to act, compromised Express Scripts’s position with respect to the resolution or defense of the Action.
- b. CITY OF TEMPE will indemnify and hold Express Scripts, its subsidiaries and affiliates, and their respective officers, directors and employees (each a “ Express Scripts Indemnified Party”) harmless from and against Actions asserted against a Express Scripts Indemnified Party arising from (i) breach of this Agreement by CITY OF TEMPE, (ii) negligence or willful misconduct of CITY OF TEMPE, or (iii) the provision of patient identifiable or Program information or data by a Express Scripts Indemnified Party to CITY OF TEMPE or CITY OF TEMPE’s designees, or the subsequent use or disclosure of such information or data by CITY OF TEMPE or its designees, provided that (a) the Express Scripts Indemnified Party has given reasonable notice to CITY OF TEMPE of the Action, and (b) no Express Scripts Indemnified Party has, by act or failure to act, compromised CITY OF TEMPE’s position with respect to the resolution or defense of the Action.
- c. Express Scripts will maintain, during the term of this Agreement, liability coverage with limits not less than \$1,000,000 per occurrence and in the aggregate per policy year, with excess liability coverage in an amount not less than \$5,000,000 per policy year. Evidence thereof will be furnished to CITY OF TEMPE upon request.
- d. Except as provided in Section (a) above, neither Express Scripts nor any subsidiary, affiliate, or any of their respective directors, officers or employees, will be responsible for any Action resulting from the provision of or failure to provide pharmaceutical goods or services or any other action or failure to act by any retail pharmacy, pharmaceutical manufacturer or other pharmaceutical providers in connection with this Agreement.

- e. The liability of Express Scripts to CITY OF TEMPE for any negligent or willful misconduct by Express Scripts will be limited to the per occurrence liability insurance amount set forth in this Section (c).
- f. Express Scripts or CITY OF TEMPE will not be liable to each other for incidental, consequential, punitive, special, or exemplary damages.

**17. Term of Agreement**

- 17.1 This Agreement will remain in effect for an initial term of two (2) years from the Effective Date (the “Initial Term”) unless terminated, canceled or extended as otherwise provided herein. Resultant contract is non-transferable and cannot be assigned by Express Scripts without the approval of the City Procurement Office, and then only when all prices, discounts, terms and conditions of the original contract remain unchanged.
- 17.2 The CITY OF TEMPE reserves the right to unilaterally extend the contract ninety (90) days beyond the stated expiration date. In addition, by mutual agreement in the form of a written Contract Modification, any resultant contract may be renewed for supplemental periods of up to a maximum of fourth-eight (48) additional months. The period for any single renewal increment shall be determined by the City Procurement Office. Such increment shall not be for more than a period of twelve (12) months each, unless the CITY OF TEMPE is eligible to obtain significant cost and/or supply advantage by a longer contract renewal period.
- 17.3 Either party may give written notice, at least one hundred eighty (180) days prior to the end of any such term, to the other party of its intent to terminate this Agreement as of the end of the then current term. Notwithstanding the issuance of a termination notice, Express Scripts agrees to continue to render services hereunder and CITY OF TEMPE agrees to pay for services of Express Scripts in accordance with the terms of this Agreement for any claims incurred for prescription drug benefits by Eligible Persons while this Agreement was in force.
- 17.4 In the event of a material breach of this Agreement, the party alleging such breach will give written notice thereof to the other parties. If such breach is not cured within sixty (60) days of receipt of such notice, the non-breaching party may terminate this Agreement upon written notice to the other party.
- 18. **Taxes:** Any applicable sales, use, or other similarly assessed and administered tax imposed on items dispensed, or services provided hereunder, or any other amounts Express Scripts may incur or be required to pay arising from our relating to Express Scripts’s performance of services as a third-party administrator in any jurisdiction, will be the sole responsibility of CITY OF TEMPE. If Express Scripts is legally obligated to collect and remit sales, use, or other similarly assessed and administered tax in a particular jurisdiction, or to incur or pay any amount relating to third-party administrator services, the tax or other amount will be reflected on the applicable invoice or subsequently invoiced at such time as Express Scripts becomes aware of such obligation or as such obligation becomes due.
- 19. **Unauthorized Firearms & Explosives:** No person conducting business on City property is to carry a firearm or explosive of any type. Any City bidder, contractor or subcontractor



is to honor this requirement at all times and failure to honor this requirement will result in contract cancellation. This requirement also applies to persons who maintain a concealed weapon's permit. In addition to contract cancellation, anyone carrying a firearm or explosive device will be subject to police and legal action.

**20. Retail Pharmacy Program**

The specific features of the Retail Pharmacy Program are as follows:

- a. **Program Coverage** - The Program coverage (Covered Drugs/Exclusions) and days supply limitation covered under the Retail Pharmacy Program will be as designated by CITY OF TEMPE. Up to a thirty (30) day supply of Covered Drugs per prescription or refill may be dispensed under the Retail Pharmacy Program.
- b. **Participating Pharmacy Networks** - Express Scripts will maintain a Participating Pharmacy Network reasonably necessary to provide services under the Retail Pharmacy Program. Express Scripts will have the responsibility to contract with Participating Pharmacies. Express Scripts will be responsible for any amounts that it owes to Participating Pharmacies that exceeds the reimbursement it receives from CITY OF TEMPE as specified in Section 1 of Schedule A. Express Scripts will retain any reimbursement that it receives from CITY OF TEMPE as specified in Section 1 of Schedule A that is in excess of the amounts it is obligated to pay to Participating Pharmacies.
- c. **Identification Cards** - Express Scripts will (i) produce Identification Cards for those Eligible Persons designated by CITY OF TEMPE, with an accompanying explanatory brochure, and (ii) make direct reimbursement claim forms available through the [www.Express Scripts.com](http://www.Express Scripts.com) internet site for use by Eligible Persons who have not received their Identification Cards, or have had them lost or stolen. Express Scripts will distribute Identification Cards and claim forms to the designated Eligible Persons unless otherwise designated by the CITY OF TEMPE. All costs associated with distributing and/or mailing such materials are the responsibility of CITY OF TEMPE.
- d. **Claim Adjudication** - Express Scripts will adjudicate claims for prescription drug benefits in accordance with Express Scripts's *TelePAID* System and the applicable Plan Design. Disapproved claims will be transmitted via *TelePAID* to the submitting pharmacy with a brief explanation of the cause or causes for disapproval. Should CITY OF TEMPE determine that a previously disapproved claim should be approved, and so direct Express Scripts, adjudication of the claim will be accomplished promptly by Express Scripts. Express Scripts is obligated to pay Participating Pharmacies for all claims adjudicated through the *TelePAID* System. CITY OF TEMPE will pay Express Scripts for these claims pursuant to Schedule A, Section 1. Express Scripts will promptly refer to CITY OF TEMPE all non-routine inquiries by insurance departments, attorneys, claimants, or other persons following the denial of any claims.
- e. **Administrative Services** – Express Scripts will provide, as applicable, the Base Administrative Services and the Additional Administrative Services set forth in Schedule A.

- f. **Pricing** - The Program Pricing Terms applicable to the Retail Pharmacy Program are set forth in Section 1, Schedule A, in addition to the performance standards and penalties set forth in this agreement.

## **21. Mail Order Pharmacy Program**

### **21.1 Program Coverage**

1. The Program coverage (Covered Drugs/Exclusions) and days supply limitation under the Mail Order Pharmacy Program will be as designated by CITY OF TEMPE in the applicable Plan Design.
2. Express Scripts's mail order pharmacies will not be required to dispense prescriptions for greater than a ninety (90) day supply of Covered Drugs per prescription or refill, subject to the professional judgment of the dispensing pharmacist, limitations imposed on controlled substances and manufacturer's recommendations. Prescriptions may be refilled providing the prescription so states. Prescriptions will not be filled (i) more than twelve (12) months after issuance, (ii) more than six (6) months after issuance for controlled drug substances, or (iii) if prohibited by applicable law or regulation.

### **21.2 Dispensing Procedures**

- a. Express Scripts's mail order pharmacies will dispense Covered Drugs to Eligible Persons, and dispense generic drugs when authorized, in accordance with (i) applicable law and regulations in the state in which Express Scripts's mail order pharmacy is located, and (ii) the terms of this Agreement and Plan Design(s). Any prescriptions that are not dispensed will be returned to the applicable Eligible Person with an explanation as to why it could not be dispensed in accordance with Express Scripts's standard operating procedures.
- b. All matters pertaining to the dispensing of Covered Drugs or the practice of pharmacy in general are subject to the professional judgment of the dispensing pharmacist.
- c. Any drug which cannot be dispensed in accordance with Express Scripts's mail order pharmacy dispensing protocols, or which requires special record-keeping procedures, may be excluded from coverage by Express Scripts.

- 21.3 Claim Adjudication** - Express Scripts will adjudicate and pay approved claims for prescription drug benefits in accordance with Express Scripts's *TelePAID* System and the applicable Plan Design. Should CITY OF TEMPE determine that a previously disapproved claim should be approved, and so direct Express Scripts, adjudication of the claim will be accomplished promptly by Express Scripts. CITY OF TEMPE will pay Express Scripts for claims adjudicated through the *TelePAID* System, pursuant to Section 2, Schedule A. Express Scripts will promptly refer to CITY OF TEMPE all non-routine inquiries by insurance departments, attorneys, claimants, or other persons following the denial of any claims.

**21.4 Pricing** - The Program Pricing Terms applicable to the Mail Order Pharmacy Program are set forth in Schedule A (which is considered confidential information), in addition to the performance standards and penalties set forth in this agreement. Express Scripts will have the responsibility to contract with drug wholesalers and manufacturers regarding Express Scripts's purchase of drugs that are dispensed by it under the Mail Order Pharmacy Program. Express Scripts will be responsible for any amounts that it owes drug wholesalers or manufacturers that exceeds the amounts it charges and receives from CITY OF TEMPE or Eligible Persons, as specified in Section 2, Schedule A. Express Scripts will retain any payment that it receives from CITY OF TEMPE or Eligible Persons as specified in Section 2, Schedule A that is in excess of the amounts it is obligated to pay to drug wholesalers or manufacturers for the purchase of such drugs that are dispensed under the Mail Order Pharmacy Program.

## **22. Formulary**

CITY OF TEMPE will be a participating plan sponsor in Express Scripts's *Preferred Prescriptions* Formulary as set forth below for the term of this Agreement. CITY OF TEMPE will provide Express Scripts with advance notice of each Group that will participate in the *Preferred Prescriptions* Formulary.

1. **Preferred Prescriptions Formulary** - The *Preferred Prescriptions* Formulary is a prescription drug formulary administered by Express Scripts which lists FDA approved drugs that have been evaluated for inclusion on the *Preferred Prescriptions* Formulary. The drugs included on the *Preferred Prescriptions* Formulary will be modified by Express Scripts from time to time as a result of factors including, but not limited to, medical appropriateness, manufacturer rebate arrangements, and patent expirations. Express Scripts will implement Express Scripts's formulary management programs, which may include cost containment initiatives, therapeutic interchange programs, communications with Eligible Persons, Participating Pharmacies and/or physicians (including communications regarding generic substitution programs), and financial incentives to Participating Pharmacies for their participation. Compliance with the *Preferred Prescriptions* Formulary and Express Scripts's formulary management program will result in Formulary Rebates as set forth below. Express Scripts reserves the right to modify or replace the *Preferred Prescriptions* Formulary (including any modification or replacement, the "Formulary") and formulary compliance methods and cost containment initiatives consistent with good pharmacy practice. CITY OF TEMPE agrees that Express Scripts will be the exclusive formulary administrator for CITY OF TEMPE's prescription drug benefit programs during the term of the Agreement. CITY OF TEMPE is authorized to use the Formulary only for its own Eligible Persons and only as long as the Program is in effect and administered by Express Scripts.
2. **Rebates** - Express Scripts and its subsidiaries receive formulary rebates from certain drug manufacturers as a result of the inclusion of those manufacturers' branded products on the Formulary ("Formulary Rebates"). Express Scripts also receives Manufacturer Administrative Fees from certain manufacturers for such products. Formulary Rebates and Manufacturer Administrative Fees are jointly referred to as "Total Rebates." Express Scripts will provide CITY OF TEMPE with the greater of (i) 100% of the Total Rebates received by Express Scripts based on the dispensing of each manufacturer's formulary drugs under CITY OF TEMPE's Program, less a Formulary management fee equal to 15% of the Total Rebates received by Express Scripts under the Program or (ii) the Guaranteed Rebates (as defined below) less a Formulary management fee equal to 15% of

the Guaranteed Rebates. This management fee will be retained by Express Scripts under the Program. Guarantee Rebates (as defined below) less a formulary management fee will be credited against future billings to CITY OF TEMPE under the Program ninety days (90) days after the end of each calendar quarter, provided CITY OF TEMPE has executed this Agreement. Total Rebates due CITY OF TEMPE under this Agreement that are received by Express Scripts within eighteen (18) months after termination or expiration of this Agreement will be paid to CITY OF TEMPE. Total Rebates received thereafter will be retained by Express Scripts.

3. **Guaranteed Rebates** - Express Scripts will credit CITY OF TEMPE, within ninety (90) days following the end of each calendar quarter the sum of (i) \$32.00 times the total number of Covered Brand Drug prescriptions billed and paid for under CITY OF TEMPE's Retail Pharmacy Program during such Contract Year, plus (ii) \$135.00 times the total number of Covered Brand Drug prescriptions billed and paid for under CITY OF TEMPE's Mail Order Pharmacy Program during the same Contract Year (collectively the "Guaranteed Rebates"). Express Scripts will calculate CITY OF TEMPE's Total Rebates during such Contract Year. Provided CITY OF TEMPE complies fully with the Formulary and with the Formulary management programs implemented by Express Scripts, if Total Rebates (less the formulary management fee) for any Contract Year during the Initial Term are greater than the Guaranteed Rebates (less the formulary management fee), Express Scripts will credit such difference against future billings to CITY OF TEMPE under the Program one hundred eighty (180) days after the end of each Contract Year. The Guaranteed Formulary Rebates are contingent upon CITY OF TEMPE implementing a three tier formulary whose differential in copayment or its reasonably equivalent value for coinsurance between formulary and non-formulary drugs is not less than \$15.00.
4. If a government action, change in law or regulation, change in the interpretation of law or regulation or action by any drug manufacturer or by CITY OF TEMPE has an adverse effect on the availability of Total Rebates or the Program Pricing Terms, Express Scripts may modify, as applicable, the Total Rebates due CITY OF TEMPE or the Guaranteed Rebates or the Program Pricing Terms.
5. Any lines of CITY OF TEMPE's business, or any Group of Eligible Persons, for which CITY OF TEMPE funds less than 50% of the costs of Covered Drugs under the Plan Design will not be entitled to Formulary Rebates and Additional Rebates and Fees. Calculations and guarantees under Sections 2 and 3 will not include prescriptions dispensed for any such lines of business or Groups

IN WITNESS WHEREOF, the parties hereto have executed this Agreement, this the \_\_\_\_ day of \_\_\_\_\_, 2014.

**CITY OF TEMPE**

By: \_\_\_\_\_  
Mark Mitchell, Mayor

ATTEST:

\_\_\_\_\_  
Brigitta Kuiper, City Clerk

APPROVED AS TO FORM:

\_\_\_\_\_  
Judi Baumann, City Attorney

**EXPRESS SCRIPTS HEALTH SOLUTIONS, INC.**

By: \_\_\_\_\_

Name & Title: \_\_\_\_\_